A

GANDA SETIA CEMERLANG SDN BHD & ANOR v. MAIKA HOLDINGS BHD

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
HAMID SULTAN ABU BACKER JCA
B MARY LIM JCA
[CIVIL APPEAL NO: W-02(NCC)(A)-1320-07-2016]
16 OCTOBER 2017

C ***COMPANY LAW:*** *Winding up – Voluntary winding up – Application to commence proceedings against company – Leave of court – Allegation of breaches of agreement – Whether baseless or without substance – Whether there was serious dispute between parties warranting trial – Whether there was a prima facie case – Whether appellate intervention warranted – Whether leave to commence action against company granted – Companies Act 1965, s. 263(2)*

D ***COMPANY LAW:*** *Winding up – Voluntary winding up – Application to commence proceedings against company – Leave of court – Allegation of breaches of agreement – Whether baseless or without substance – Claim for specific performance of agreement – Whether winding up court could decide on order of specific performance – Role of civil court – Whether only to decide on order of* E *specific performance in event leave to commence litigation allowed – Whether there was serious dispute between parties warranting trial – Prima facie case – Whether established – Whether appellate intervention warranted – Whether leave to commence action against company granted – Companies Act 1965, ss. 226(3), 263(2)*

F The respondent company ('respondent') entered into a sale and purchase agreement wherein, subject to various terms and conditions, the respondent agreed to sell to the first appellant two plots of lands for a total purchase consideration of RM3,312,000. In respect of the first piece of land, the respondent together with various individual owners were the registered proprietors of an undivided portion of land. Effectively, the respondent sold G its shares representing 22.4163 acres to the appellants ('the bigger plot'). The respondent was the sole registered proprietor of the other plot, known as the 'smaller plot', which comprised 1.5837 acres of land and was sold to the first appellant for RM3,093,449.40. Under the terms and conditions of the sale and purchase agreement, the respondent agreed to (i) submit an application H to sub-divide the bigger plot and ultimately see to the issuance of individual titles with the names of the appellants endorsed therein; and (ii) evict or remove all and any squatters or unlawful occupiers from the lands sold. There was also a temple sited on the bigger plot which the appellants alleged that the respondent agreed to relocate. These conditions, however, were not I fulfilled. Subsequently, the two plots were registered in the names of the appellants after full payment was affected. Despite repeated requests from the

appellants, the conditions and the matter of the temple remained unresolved. The appellants decided to sue the respondent for breach of contract seeking primarily an order of specific performance of these obligations under the sale and purchase agreement. The appellants sought leave under s. 263(2) of the Companies Act 1965 ('CA 1965') to commence proceedings against the respondent as the respondent was voluntarily wound up under s. 254 of the CA 1965. The three liquidators of the respondent opposed the application for leave. At the High Court, the trial judge refused to exercise discretion under s. 263(2) of the CA 1965 in the appellants' favour. The trial judge, in dismissing the application for leave, held that the appellants' claim was misconceived; that the respondent was divested of all interest in the two plots and was not in the position to attend to the complaints of the appellants and that the order of specific performance sought would render financial hardship on the respondent. Hence, this appeal.

Held (allowing appeal with costs)
Per Mary Lim JCA delivering the judgment of the court:

(1) The remedy of specific performance remains one which the winding up court cannot make; and certainly, it is not a remedy that can be resolved through the lodgement of a proof of debt with the liquidators of the respondent. That order is properly in the jurisdiction of the court in exercise of its civil jurisdiction, and granted, if at all, after trial. The order of specific performance is a discretionary remedy and the law on pleadings allows for an alternative remedy in the event specific performance is not granted. That, however, does not diminish the significance of the remedy as a primary or main remedy. In the weighing of discretion, the court will always question the issue of adequateness of damages as an alternative remedy. It is precisely because damages is not an adequate remedy that specific performance is sought. This court did not see how, by an alternative plea, leave to commence action against the respondent should be denied. (para 41)

(2) In the context of s. 226(3) of the CA 1965, what needs to be shown is that there is a serious dispute between the parties that warrants a trial to determine the truth. The court does not delve into the merits of the dispute but examines the complaints, to see if these complaints are genuine or are baseless and devoid of any substance. The sale and purchase agreement ('SPA') contains terms concerning the subdivision of the bigger plot and the eviction of squatters. The appellants have also alluded to correspondence exchanged between the parties, post payment and registration, on these matters. It was not for this court to evaluate the truth of the warring contentions and to determine the real position of the squatters or even the matter of location or relocation of a temple

on the subject land; that is for the civil court to hear and determine. For the purpose of s. 263(2), the appellant needed to show that their dispute was real, genuine and serious and that they had a *prima facie* case. In that regard, the appellants had amply satisfied those considerations. The allegation of breaches of agreement by the respondent were not baseless or without substance. (paras 43-47)

(3) The appellants showed that there was a retention of some monies amounting to 30% of the purchase consideration by the solicitors of the respondent, which was said to have been retained for issues related to private caveat and existing squatters on the subject land. The retention of the sum post SPA was said to confirm the existence of the obligations as alleged by the appellants and address the concerns of the respondent. Thus, the appellate intervention was appropriate in this appeal. Leave pursuant to s. 263(2) of the CA 1965 was granted to the appellants to commence action against the respondent. (para 50).

Bahasa Malaysia *Headnotes*

Syarikat responden ('responden') memasuki satu perjanjian jual beli di mana, tertakluk pada beberapa terma dan syarat, responden bersetuju menjual kepada perayu pertama dua plot tanah dengan balasan jumlah pembelian berjumlah RM3,312,000. Berkenaan plot tanah pertama, responden bersama-sama dengan beberapa pemilik individu adalah pemilik berdaftar satu plot tanah yang tidak berbelah bahagi. Responden telah menjual sahamnya mewakili 22.4163 ekar kepada perayu-perayu ('plot tanah besar'). Responden adalah pemilik berdaftar tunggal plot tanah yang lagi satu, dikenali sebagai 'plot tanah kecil', yang terdiri daripada 1.5837 ekar tanah dan dijual kepada perayu pertama pada harga RM3,093,449.40. Di bawah terma dan syarat perjanjian jual beli, responden bersetuju untuk (i) mengemukakan permohonan untuk membahagikan plot besar dan memastikan pengeluaran hak milik individu dengan nama-nama perayu yang disahkan dalamnya; dan (ii) mengusir atau mengeluarkan kesemua dan mana-mana setinggan atau penduduk tidak sah dari tanah-tanah yang telah dijual. Terdapat juga sebuah kuil atas plot tanah yang didakwa perayu-perayu akan dipindahkan oleh responden seperti dipersetujui. Syarat-syarat ini, walau bagaimanapun, tidak dipenuhi. Seterusnya, kedua-dua plot tanah didaftar dalam nama perayu-perayu selepas bayaran penuh dilaksanakan. Walaupun terdapat permintaan berulang daripada perayu-perayu, syarat-syarat dan hal perkara kuil masih belum diselesaikan. Perayu-perayu memutuskan untuk menyaman responden atas pelanggaran kontrak, menuntut terutamanya, perintah pelaksanaan spesifik obligasi-obligasi bawah perjanjian jual beli. Perayu-perayu memohon kebenaran bawah s. 263(2) Akta Syarikat 1965 ('AS 1965') bagi memulakan prosiding terhadap responden kerana responden secara suka rela digulung bawah s. 254 AS 1965. Tiga likuidator responden

menentang permohonan kebenaran. Di Mahkamah Tinggi, hakim bicara enggan melaksanakan budi bicara bawah s. 263(2) AS 1965 memihak perayu-perayu. Hakim bicara, dalam menolak permohonan kebenaran, memutuskan tuntutan perayu-perayu disalah tanggap; bahawa responden dilucutkan segala kepentingan dalam dua plot tanah itu dan tidak berada dalam kedudukan untuk menangani aduan-aduan perayu dan bahawa perintah pelaksanaan spesifik yang dituntut akan menyebabkan masalah kewangan kepada responden. Oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Remedi pelaksanaan spesifik adalah satu remedi yang tidak boleh diputuskan oleh mahkamah penggulungan; dan ia bukan remedi yang boleh diselesaikan melalui penyerahan bukti hutang dengan pelikuidasi responden. Perintah itu adalah dalam bidang kuasa mahkamah dalam pelaksanaan bidang kuasa sivil dan dibenarkan, jika pun ada, selepas perbicaraan. Perintah pelaksanaan spesifik adalah satu remedi budi bicara dan undang-undang pliding membenarkan remedi alternatif jika pelaksanaan spesifik tidak dibenarkan. Itu, walau bagaimanapun, tidak mengurangkan kepentingan remedi sebagai remedi utama dan induk. Dalam mempertimbangkan budi bicara, mahkamah akan selalu menyoal isu kecukupan ganti rugi sebagai remedi alternatif. Pelaksanaan spesifik dituntut kerana ganti rugi bukan remedi yang mencukupi. Mahkamah ini tidak dapat melihat bagaimana melalui rayuan alternatif, kebenaran memulakan tindakan terhadap responden harus dinafikan.

(2) Dalam konteks s. 226(3) AS 1965, apa yang perlu ditunjuk adalah bahawa terdapat pertikaian serius antara pihak-pihak yang mewajarkan perbicaraan bagi menentukan kebenaran. Mahkamah tidak menyelidiki merit pertikaian tetapi meneliti aduan, untuk melihat sama ada aduan-aduan ini tulen atau tidak berasas dan tanpa sebarang substans. Perjanjian jual beli ('PJB') mengandungi syarat-syarat berkenaan pembahagian plot besar dan pengusiran setinggan. Perayu-perayu juga merujuk pada surat menyurat antara pihak-pihak, bayaran pos dan pendaftaran mengenai perkara-perkara ini. Mahkamah ini tidak boleh menilai kebenaran hujahan-hujahan yang dikemukakan atau untuk menentukan kedudukan sebenar setinggan-setinggan atau juga perkara lokasi atau penempatan semula kuil atas tanah subjek; ia perlu didengar dan diputuskan oleh mahkamah sivil. Bagi tujuan s. 263(2), perayu harus menunjukkan bahawa pertikaian adalah benar, tulen dan serius dan mereka mempunyai kes *prima facie.* Dalam hal ini, perayu-perayu telah memenuhi pertimbangan-pertimbangan itu. Dakwaan bahawa terdapat pelanggaran kontrak oleh responden bukan tidak berasas dan bukan tanpa substans.

(3) Perayu-perayu menunjukkan bahawa terdapat pengekalan sejumlah wang sebanyak 30% daripada balasan pembelian, yang dikekalkan untuk isu berkaitan dengan kaveat persendirian dan setinggan sedia ada di tanah subjek. Pengekalan jumlah itu selepas PJB adalah untuk mengesahkan kewujudan obligasi seperti yang didakwa oleh perayu-perayu dan menangani kebimbangan responden. Oleh itu, campur tangan rayuan adalah sesuai dalam rayuan ini. Kebenaran menurut s. 263(2) AS 1965 dibenarkan kepada perayu-perayu bagi memulakan tindakan terhadap responden.

Case(s) referred to:

Bruno Phillipe Fehrenbach v. Pegawai Penerima, Malaysia [1999] 6 CLJ 177 HC ***(refd)***
Capita Financial Group Ltd v. Rothwells Ltd (No 2) [1989] 7 ACLC 634 ***(refd)***
Ex p Walker [1982] 6 ACLR 423 ***(refd)***
Mesuntung Property Sdn Bhd v. Kimlin Housing Development Sdn Bhd [2014] 7 CLJ 202 CA ***(refd)***
Mosbert Bhd (In Liquidation) v. Stella D'Cruz [1985] 1 LNS 47 FC ***(refd)***
Re Coastal Constructions Pty Ltd (In Liquidation) [1994] 13 ACSR 329 ***(refd)***
Re Cuthbert Lead Smelting Co Ltd [1886] WN 84 ***(refd)***
Re Gordon Grant & Grant Pty Ltd [1983] 2 Qd R 314 ***(refd)***
Re Stuart Bros Pty Ltd [1995] 16 ACSR 451 ***(refd)***
Shencourt Sdn Bhd v. Perumahan NCK Sdn Bhd [2008] 3 CLJ 582 CA ***(refd)***
Speiser v. Locums Financial Management Pty Ltd [1997] 22 ACSR 478 ***(refd)***
Thomson v. Mulgoa Irrigation Co Ltd [1893] 4 BC (NSW) 33 ***(refd)***
Westech Sdn Bhd v. Thong Weng Lock [2014] 8 CLJ 1050 CA ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 211, 226(3), 254, 255(6), 263(2)
Rules of Court 2012, O. 18 r. 19
Companies Act 1961 [Aus], s. 371(2)
Companies Act 1989 [Aus], s. 471B

For the appellant - Sugandra Rao Naidu; M/s Rao & Co
For the respondent - Anantha Krishnan Gopala Krishnan & Orpheus M Modili; M/s Anantha Krishnan

[Editor's note: For the High Court judgment, please see Ganda Setia Cemerlang Sdn Bhd & Satu Lagi lwn. Maika Holdings Bhd [2017] 1 LNS 161 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Mary Lim JCA:

[1] The appellants sought leave under s. 263(2) of the Companies Act 1965 to commence proceedings against the respondent as the respondent was voluntarily wound up under s. 254 of the Companies Act 1965 on 20 May 2015. The application was opposed by the liquidators of the respondent. Leave was refused.

[2] At the appeal, we unanimously allowed the appeal and set aside the decision of the High Court. Our reasons in full are set out below.

Brief Facts

[3] Prior to being wound up, the respondent entered into an agreement dated 21 March 2011 wherein subject to various terms and conditions, the respondent agreed to sell to the first appellant two plots of lands for a total purchase consideration of RM3,312,000. In respect of the first piece, the respondent together with various individual owners were the registered proprietors of an undivided portion of land held under Geran 94160, Lot 5732, Mukim Batu, Daerah Kuala Langat, Negeri Selangor. Effectively, the respondent sold its shares representing 22.4163 acres to the appellants. This was known as the "bigger plot" and it was sold for RM218,550.60. The other plot, known as the "smaller plot" comprised 1.5837 acres of land held under Geran 50209, Lot 1870, Mukim Batu, Daerah Langat, Negeri Selangor. The respondent was the sole registered proprietor of this plot which it sold to the first appellant for RM3,093,449.40.

[4] Under the terms and conditions of the sale and purchase agreement, the respondent agreed to:

(i) submit an application to sub-divide the bigger plot and ultimately see to the issuance of individual titles with the names of the appellants endorsed therein; and

(ii) evict or remove all and any squatters or unlawful occupiers from the lands sold.

[5] There was also a temple sited on the bigger plot which the appellants alleged that the respondent agreed to relocate. These conditions were not fulfilled. The bigger plot remained un-sub-divided and some squatters remain on the affected plot. The appellants take the position that since a portion of the purchase monies paid was retained by solicitors then engaged by the respondent, the respondent had acknowledged its obligation to attend to the removal of squatters and the relocation of the temple.

[6] On 9 November 2012, the two plots were registered in the names of the appellants after full payment was affected. The bigger plot was registered in the name of the two appellants while the smaller plot was registered in the first appellant's name. The respondent remained the registered proprietor of 94837/470100 share of the bigger plot. Despite repeated requests from the appellants, the two conditions mentioned above and the matter of the temple remained unresolved. The appellants decided to sue the respondent for breach of contract seeking primarily an order of specific performance of these two obligations under the sale and purchase agreement. Because the respondent was wound up, though voluntarily, the appellants were required

to obtain leave of the winding up court before commencing its claim. The three liquidators of the respondent opposed the application for leave. Two of the three liquidators are former directors of the respondent.

[7] On the matter of the squatters, the respondent denied owing any obligation as alleged and further contended that in any event, all squatters had already been removed. As for the relocation of the temple, the respondent also denied owing any obligation since this only arose after the appellants had taken possession of the lands. According to the respondent, it had since sold a further 7 acres of the bigger plot to a company known as "TS Land Management Sdn Bhd". The balance share of the bigger plot was said to be held by the respondent on trust for a Tamil school located on the plot. Given that the respondent was therefore no longer the registered proprietor of the two plots of land, the respondent argued that it was in no position to take any action against the squatters, or even to subdivide the bigger plot. Any effort in these respects will not only be futile or "doomed to fail" but will also result in unnecessary litigation and costs. The respondent also contended that the appellants' interest was really monetary in value as the appellants could initiate action themselves in the two respects, and then recover any related expenses from the respondent by filing a proof of debt with the liquidators.

Decision Of The High Court

[8] The learned judge refused to exercise discretion under s. 263(2) of the Companies Act 1965 in the appellants' favour and the application for leave was dismissed for the following reasons.

[9] First, having established that leave under s. 263(2) was required even where the winding up was voluntary, the learned judge found that the appellants had nevertheless failed to establish a *prima facie* case which is required when securing leave of the court. The learned judge agreed with the respondent that the appellants' claim was misconceived because the appellants were the newly registered proprietors of the two plots. With that registration, the respondent was divested of all interest in the two plots and was not in the position to attend to the complaints of the appellants. The learned judge added that the appellants were aware of this position as reflected in the alternative relief sought by the appellants, that the appellants be given leave to evict the squatters themselves. The learned judge further agreed with the respondent that it was for the appellants to apply for the subdivision of land and to evict the unlawful occupants or squatters, and then recover the related expenses from the liquidators through the filing of a proof of debt.

[10] It was also the view of the learned judge that leave ought not to be given because the order of specific performance sought would render financial hardship on the respondent. This was said to be contrary to the purpose of winding up, which is that the assets of the company are to be preserved for fair distribution and not exhausted unnecessarily.

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Decision Of The Court Of Appeal

[11] This appeal calls for the consideration of s. 263(2) of the Companies Act 1965. Section 263(2) requires leave of court to be obtained before any action or proceeding may be commenced or proceeded with where the company has been wound up, though voluntarily. In this case, the respondent was wound up voluntarily by its members on 20 May 2015. Three of its members, namely T. Tamil Selvan a/l Tangavellu, Ramesh a/l Alagu and Arasu a/l M Thangaveloo were appointed as its liquidators. On behalf of the respondent, T. Tamil Selvan together with Arasu a/l M Thangaveloo signed the SPA dated 21 March 2011 that is the subject of the intended action. T. Tamil Selvan a/l Tangavellu has since passed away.

C

D

[12] We observe from the authorities cited by both parties that some of those cases in fact concerned not s. 263(2) but, s. 226(3) of the Companies Act 1965. Having examined the provisions and the case law, we feel compelled to make some observations on the two provisions. These provisions read as follows:

E

Copy of order to be lodged, etc.

226(1) Within seven days after the making of a winding up order the petitioner shall lodge with the registrar notice of:

F

(a) the order and its date; and

(b) the name and address of the liquidator.

(2) On the passing …

Actions stayed on winding up order

G

(3) When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except:

(a) by leave of the Court; and

(b) in accordance with such terms as the Court imposes.

H

Property and proceedings.

263(1) Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of a creditor's voluntary winding up shall be void.

I

A (2) After the commencement of the winding up no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.

[13] Both sections are part of Part X of the Companies Act 1965. Part X deals with matters relating to the winding up of a company. Part X contains
B five Divisions:

Division 1 – Preliminary matters

Division 2 – Winding up by the court

Division 3 – Voluntary winding up

C Division 4 – Provisions applicable to every mode of winding up

Division 5 – Winding up of unregistered companies

[14] In law, a company may be wound up either by the court or voluntary by the company itself – see s. 211 of Division 1. Once a company has been
D wound up by the court, or once the winding up court has appointed a provisional liquidator, s. 226(3) mandates that leave of the winding up court must be procured either before an action or proceeding is commenced or if already commenced, proceeded with.

[15] Where the company is wound up voluntarily, and that may be by
E special resolution of the company, or due to the expiration of the duration of the company fixed either in its memorandum or articles of association and a general resolution has been passed to that effect (see s. 254) or even on grounds of insolvency and a statutory declaration to that effect has been lodged with the Registrar of Companies and with the official receiver (see
F s. 255), s. 263(2) carries a similar requirement on leave as that found in s. 226(3).

[16] In both situations, the court may impose terms when granting leave. The difference, however, between the two scenarios is when leave must be procured. In the case of a company which has been wound up by the court,
G it will be upon pronouncement of the order to wind up the company or a provisional liquidator has been appointed. In the case of a company which has been wound up voluntarily, leave must be sought either at the time of the passing of the resolution to wind up the company, or in the case where a provisional liquidator has been appointed, upon lodgment of the statutory
H declaration with the Registrar of Companies and with the official receiver – see s. 255(6).

[17] Moving on and given that this requirement for leave exists under both scenarios, the issue then is whether the exercise of discretion in the granting of leave is subject to or upon the same considerations. In this respect, the
I decisions of the Court of Appeal in *Shencourt Sdn Bhd v. Perumahan NCK Sdn*

Bhd [2008] 3 CLJ 582; [2008] 5 MLJ 191 and *Westech Sdn Bhd v. Thong Weng Lock* [2014] 8 CLJ 1050; [2014] 3 MLJ 427 are instructive. In both decisions, the company in question had been wound up voluntarily.

[18] In both appeals, the Court of Appeal applied the test or approach that was laid down in *Mosbert Berhad (In Liquidation) v. Stella D'Cruz* [1985] 1 LNS 47; [1985] 2 MLJ 446. That test being whether the claim intended to be filed or proceeded with can be dealt with adequately in the winding up or the remedy sought cannot be given in the winding up proceedings. If all reliefs sought may be obtained in the winding up court, then leave will be refused. Quoting an old English decision of *Re Cuthbert Lead Smelting Co Ltd* [1886] WN 84, speaking for the Supreme Court, Seah SCJ said:

> In *Re Cuthbert Lead Smelting Co Ltd* it was held that if the applicant could obtain all the relief in the winding up leave would be refused. *In short, the Court will always give an applicant leave if his claim cannot be dealt with adequately in the winding up or if the remedy he seeks cannot be given him in the winding up proceedings.*
>
> (emphasis added)

[19] As mentioned earlier, this test was applied in *Shencourt Sdn Bhd v. Perumahan NCK Sdn Bhd*. According to the Court of Appeal, at p. 588 (CLJ); p. 134 (MLJ), leave to proceed would be granted where a claim cannot be adequately dealt with in the winding up by the company's liquidators:

> [11] On the guiding principle for the Court to grant leave with a view to commencing action against a company that has been wound-up we would like to refer to the case of *Mosbert Berhad (In Liquidation) v. Stella D'Cruz* [1985] 2 MLJ 446 wherein Seah SCJ, in delivering the judgment of the Supreme Court at p 447 had this to say:
>
> > In *Re Cuthbert Lead Smelting Co Ltd* it was held that if the applicant could obtain all the relief in the winding up leave would be refused. In short, the Court will always give an applicant leave if his claim cannot be dealt with adequately in the winding up or if the remedy he seeks cannot be given to him in the winding up proceedings.
>
> [12] it is clear based on the above cited case authority leave to proceed would only be granted when the plaintiff's claim cannot be adequately dealt with in winding up of the defendant's company or when the plaintiff is seeking a remedy which cannot be given in the winding up of the defendant's company.

[20] Similarly, in *Westech Sdn Bhd (in voluntary liquidation) v. Thong Weng Lock (as surviving partner of Thong Kee Trading Co)*, the Court of Appeal opined that the "real test" for an application of s. 263(2) is not whether the company is wound up voluntarily by its members or otherwise; but the test as laid

down in *Mosbert Berhad (In Liquidation) v. Stella D'Cruz (supra).* The same view expressed by the Seah SCJ in *Mosbert Berhad* was once again quoted by the Court of Appeal:

> [35] On this point we disagree with the view expressed by learned counsel for the plaintiff that s. 263 of the Companies Act 1965 does not apply to voluntary winding up. Case laws have established that the test for an application of s. 263 of the Companies Act 1965 is not whether the winding up is voluntary by members or otherwise. The real test is laid down by the then Supreme Court in *Mosbert Bhd* which is stated in this form:
>
> > In *Re Cuthbert Lead Smelting Co Ltd* it was held that if the applicant could obtain all the relief in the winding up leave would be refused. In short, the Court will always give an applicant leave if his claim cannot be adequately in the winding up or if the remedy he seeks cannot be given him in the winding up proceedings.

[21] Now, what needs to be pointed out is that in *Mosbert Berhad (In Liquidation) v. Stella D'Cruz*, the application for leave was one made under s. 226(3) and not s. 263(2) of the Companies Act 1965. This was because Mosbert had been wound-up by an order of court and not upon voluntary liquidation. Consequently, the application for leave to commence action was properly initiated under s. 226(3).

[22] We are however, of the considered opinion that having examined the rationale and the basis for requiring such leave, the test remains the same regardless of how the liquidation of the company was set afoot. Save for the timing when such an application is to be made, no distinction needs to be drawn between the two situations envisaged under ss. 226(3) and 263(2), particularly since no useful or meaningful purpose will be served.

[23] The rationale for this requirement for leave was carefully explained by the Supreme Court in *Mosbert Berhad*. In explaining why applications for leave must be made *inter partes*, the Supreme Court said:

> …, it cannot be disputed that the primary object of winding up is the collection and distribution of the assets of the company *pari passu* amongst unsecured creditors after payment of preferential debts. And the purpose of the statutory provision is to ensure that all claims against the company in liquidation which can be determined by cheap and summary procedure available in a winding up are not made the subject of expensive litigation. The provision is designed to prevent unnecessary multiplicity of suits which may result in dissipating the assets of the company. It is for this reason that application under section 226(3) of the Companies Act 1965 should be made *inter partes* so that the summons could be served on the Official Receiver who should be heard before the discretion of the Court is exercised. Without hearing the Official Receiver, the Court cannot be said to have exercised the discretion judicially.

[24] This underlying rationale not only explains why all parties concerned must be heard at the time of the application, it also indicates why those persons must be heard. It reminds that the primary object of winding up of a company is to collect and distribute "the assets of the company *pari passu* amongst unsecured creditors after payment of preferential debts." The leave mechanism ensures "that all claims against the company in liquidation which can be determined by cheap and summary procedure available in a winding up are not made the subject of expensive litigation. The provision is designed to prevent unnecessary multiplicity of suits which may result in dissipating the assets of the company." Although this has been explained as the availability of remedy test, that if the relief sought can be obtained in the liquidation proceedings through the filing of a proof of debt, leave must be refused, the reasoning for this test must not be overlooked. At the end of the day, it is what is available for distribution *pari passu* amongst the unsecured creditors of the company that is paramount. The concerns on costs of expensive litigation including multiple suits litigation are obviously legitimate and not misplaced.

[25] Both parties have cited to us the more recent decision of *Mesuntung Property Sdn Bhd v. Kimlin Housing Development Sdn Bhd* [2014] 7 CLJ 202. The appeal in *Mesuntung Property* arose from a refusal to grant leave under s. 226(3) and not under s. 263(2), which is our present focus of attention. *Kimlin Housing Development Sdn Bhd*, the respondent, was wound up by the court on 27 February 1989.

[26] In allowing the appeal against the decision of the High Court which had rejected the application for leave, the Court of Appeal examined what was the "threshold test envisaged in s. 226(3) of the Companies Act 1965 before leave is granted". The Court of Appeal considered the approach by the local courts thus far and compared it with that adopted in Australia before drawing the conclusion that an applicant for leave under s. 226(3) must satisfy a "two criteria" test. We shall return to this test shortly.

[27] As far as the local cases are concerned, the Court of Appeal considered first, the approach adopted by the High Court in *Bruno Phillipe Fehrenbach v. Pegawai Penerima, Malaysia* [1999] 6 CLJ 177 where Abdul Malik Ishak J held that leave under s. 226(3) would "readily be given by the court if all requirements are fulfilled." His Lordship then examined how judicial discretion under s. 371(2) of the Australian Companies Act 1961 is exercised by the courts in Australia. Section 371(2) is in *pari materia* with s. 226(3) but it was amended and replaced by s. 471B of the Australian Companies Act 1989. Section 471B is slightly different in wording from our s. 226(3). Citing *Re Gordon Grant & Grant Pty Ltd* [1983] 2 Qd R 314; *Re Stuart Bros Pty Ltd* [1995] 16 ACSR 451; and *Speiser v. Locums Financial Management Pty Ltd* [1997] 22 ACSR 478 in support, Abdul Malik Ishak J said that the court considers whether leave to proceed should be granted by "looking at the

A nature of the plaintiff's claim, the balance of convenience and the justice of the case." Again citing *Re Gordon Grant & Grant Pty Ltd (supra)* and *Ex p Walker* [1982] 6 ACLR 423, His Lordship opined that leave will be granted "as a matter of course" where "it is unlikely that the plaintiff will obtain any advantage over the creditors and that no prejudice will be caused either to
B the creditors or to the orderly winding up of the company. His Lordship further agreed with the view expressed in *Re Coastal Constructions Pty Ltd (In Liquidation)* [1994] 13 ACSR 329, that in determining whether leave to proceed should be granted:

> … there was a necessity to examine the amount and seriousness of the
C claim, the degree of complexity of the legal and factual issues involved and lastly, the stage which the proceedings have reached. It must not be forgotten that the applicant too must establish that he or she has a *prima facie* case meaning that the applicant must show that there is a real dispute between the parties. (*Zempilas v. JN Taylor Holdings Ltd (In Prov Liq)* [1991] 3 ACRS 755 (SC SA); *Vagrand Pty Ltd (In Liq) v. Fielding* [1993] 41 FCR
D 550 [113 ALR 128]).

[28] We have no issue with the test propounded and followed in the Australian jurisdiction, but, we must point out that the discussion of the High Court on this test is *obiter* since the primary question before the court was whether s. 226(3) applied in the case of a derivative action. The applicant
E plaintiff was a minority shareholder in the defendant company that was wound up. The plaintiff contended that a derivative action is an action for the benefit of, and not an action against, the company. The applicant plaintiff was seeking a declaration to that effect. The High Court agreed with the plaintiff. In the course of deliberations, the High Court saw it fit to consider
F the Australian approach on s. 226(3) before concluding that the plaintiff was not required to apply for leave under s. 226(3) since a derivative action is not an action against the wound up company. The declaratory order was accordingly, given. The approach of the Australian courts or for that matter, our courts, though enlightening, is irrelevant to the central issue of
G application of s. 226(3) to a derivative action.

[29] Returning to *Mesuntung Properties* and the proper test or approach in a case where the primary issue is whether leave ought to be allowed under s. 226(3), the Court of Appeal went on to consider the decision of *Shencourt Sdn Bhd v. Perumahan NCK Sdn Bhd (supra)*, discussed earlier, noting that the
H Court of Appeal in that case had followed the approach laid down by the Supreme Court in *Mosbert Berhad* – see para. 21 at p. 210.

[30] The Court of Appeal however, did not stop there and simply applied the test in *Mosbert Berhad*. Like Abdul Malik Ishak J in *Bruno Phillipe*, the Court of Appeal similarly turned to examine the approach in Australia on
I the threshold question of leave. This time, the Court of Appeal considered

two decisions, one of which was cited in *Bruno Phillipe*, that is *Vagrand Pty Ltd (In Liq) v. Fielding (supra)*; and *Capita Financial Group Ltd v. Rothwells Ltd (No. 2)* [1989] 7 ACLC 634.

[31] In *Vagrand Pty Ltd*, the Federal Court of Australia also discussed the rationale for imposing a requirement for leave, that as explained by Manning J in *Thomson v. Mulgoa Irrigation Co Ltd* [1893] 4 BC (NSW) 33, it was to safeguard a company in liquidation from being harassed and its assets wasted by unnecessary litigation. In order to do that, the Federal Court is obliged to investigate the intended litigation. The Federal Court accepted that this did not mean that all the elements of an intended claim must be proved. That would be burdensome and shut out many meritorious claims. The Federal Court recognised that it is commonplace for actions against companies to depend upon documentary evidence and such evidence may not be available until discovery has taken place or witnesses interrogated or subpoenaed.

[32] In *Capita Financial Group Ltd*, the court also adopted the same approach, going further to state that provisional liquidators and liquidators are "entitled to be protected from involvement in court proceedings which may be perhaps only of a nuisance nature, or which may be thought to be totally devoid of any substance. The resources of the company in liquidation should not be frittered away in defending baseless claims." The consistent and uniform approach of the court "over the years is to demand that there be evidence showing a *prima facie* case."

[33] Having examined these authorities, both local and from Australia, the Court of Appeal then concluded:

> [24] From the above authorities, the appellant has the burden of satisfying the Court of two criteria:
>
> (a) the appellant's claim cannot be adequately dealt with by the winding up Court;
>
> (b) the appellant has a *prima facie* case against the respondent.

[34] The Court of Appeal first found the appellant's claim for the remedy of specific performance and not for monetary returns could not be dealt with by the winding up court. On the issue of what amounts to a *prima facie* case in the context of s. 226(3), the court said that the court has to be satisfied that "there is a serious dispute between litigants which warrant a trial to determine the truth of the combating allegations." The Court of Appeal likened the approach to that applied when "dealing with an application to strike out under O. 18 r. 19 Rules of Court 2012 despite the consideration that the liquidator ought not to be burdened with wasteful financial resources in defending frivolous legal actions." According to the Court of Appeal, "that consideration in our view is also a consideration for other suits not involving wound up companies as all defendants should also not be burdened with financial resources to defend frivolous legal actions."

[35] The Court of Appeal in *Mesuntung Property* then set about examining the putative claim. The Court of Appeal found that the appellant, itself a wound up company, was seeking leave to initiate a suit for specific performance of a sale and purchase agreement (SPA) entered into between the parties. In that SPA, the respondent had agreed to sell 121 lots of land in its abandoned housing project to the appellant. The appellant paid 10% of the purchase consideration of RM3.5 million as deposit together with other expenses. The time for payment of the balance purchase price was extended on condition that the appellant pays a further RM100,000. The appellant did not pay the RM100,000. Neither did the appellant pay the balance purchase price by the extended date; and so, the respondent terminated the SPA. The respondent then sold 90 of the 121 lots to a third party. The appellant's main complaint in the intended claim is the respondent's unilateral imposition of RM100,000 for the extension of time. The Court of Appeal noted that by this time, the appellant had already paid almost RM1 million.

[36] The Court of Appeal was of the view that this complaint or question "is a serious dispute between the appellant and the respondent. That question *prima facie* raises a reasonable cause of action and not to give the appellant the chance to argue that the unilateral imposition of the RM100,000 is unlawful would be contrary to the basic right of the appellant of having his day in court. Not granting leave amounts to shutting the appellant and it is a drastic action which courts should be slow to use."

[37] We are aware that although *Shencourt Sdn Bhd* and *Mosbert Berhad* were referred to by the Court of Appeal in *Mesuntung Properties*, the Court of Appeal went further to consider and compare the approach to the equivalent s. 226(3) under the Australian jurisdiction. After all, the Companies Act 1965 is structured after the Australian corporations law and its then s. 371(2) of the Australian Companies Act 1981 was in *pari materia* with our s. 226(3). Having taken that route, the Court of Appeal concluded with the two tests that we pointed out above and which the parties before us, just as they did in the court below, have both submitted. The parties have proceeded on the basis that there are now two tests that must be satisfied. The appellants argued that the tests had been met while the respondent argued otherwise; contending that not meeting the first test was enough to knock out the application and hence, this appeal.

[38] We pause to emphasise that the decision in *Mesuntung Properties* does not set down any new test; what the decision has done, in effect, is to put into clearer terms the test laid down in *Mosbert Berhad.* That test now better clarified and which applies regardless whether the application is made under s. 226(3) or 263(2), has been consistently applied in our jurisdiction.

[39] Returning to *Mesuntung Properties*, we agree with the approach enunciated therein. The requirement of leave is necessary to ensure that companies in liquidation and the liquidators of wound up companies are not embroiled in time-consuming and expensive litigation which, indirectly will impact on returns to creditors of the wound up company. Since there is already in place a statutory mechanism for resolving disputes and debts by way of lodgment of proofs of debts, there must be some good, cogent or just reason why there should be a departure from that established procedure. The availability of the remedy sought before the winding up court is only one of the reasonable reasons that may be articulated for such departure. We can see complexities of legal and factual issues or even the status of proceedings already underway, being other relevant considerations in the weighing in of exercise of discretion. This is the balancing exercise discussed by Abdul Malik Ishak J in *Bruno Phillipe* that the winding up court will have to weigh when considering whether to exercise judicial discretion to grant or refuse leave to proceed against a company in liquidation. The onus is on the appellants to demonstrate why it is more appropriate in the particular facts and circumstances to proceed by separate civil action instead of by lodgment of a proof of debt.

[40] In the present appeal, the appellants seek the principal remedy of specific performance of the SPA in relation to the two obligations of sub-division and eviction of squatters. Although the learned judge found that the relief sought could not be "adequately" dealt with by the liquidators, the learned judge was nevertheless persuaded by the presence of the alternative relief of eviction by the appellants themselves in the event the respondent failed to evict the squatters. Where that happens, the appellants seek recovery of the related costs from the respondent. It was, in this sense, that the learned judge concluded that the appellants' claim could be reduced to monetary value and therefore provable in liquidation.

[41] With respect, we cannot agree with the learned judge. Contrary to the view of the learned judge, the remedy of specific performance remains one which the winding up court cannot make; and certainly, it is not a remedy that can be resolved through the lodgment of a proof of debt with the liquidators of the respondent. That order is properly in the jurisdiction of the court in exercise of its civil jurisdiction, and granted, if at all, after trial. The presence of the alternative prayer (b) in the terms set out at p. 81 of the record of appeal does not alter that view. There may be a difference, perhaps, if the relief was couched as an additional relief. The order of specific performance is a discretionary remedy and the law on pleadings allows for this alternative remedy in the event this specific performance is not granted. That however, does not diminish the significance of the remedy as a primary or main remedy. In the weighing of discretion, the court will always question the

issue of adequateness of damages as an alternative remedy. It is precisely because damages is not an adequate remedy that specific performance is sought; but in the event the court is not with the appellants, then the appellants want to be allowed this avenue. We do not see how by this alternative plea, leave to commence action against the respondent should be denied.

[42] Moving next to the second test, the learned judge found that the appellants had failed to establish a *prima facie* case because the appellants have become the registered proprietors of the plots. That, supposedly, leaves the respondent in no position to evict the squatters or even apply for sub-division of the bigger plot.

[43] Again, here, we are reminded of what is required in establishing a *prima facie* case. In *Mesuntung Properties*, it was clearly explained that in the context of s. 226(3), what needs to be shown is that there is a serious dispute between the parties that warrants a trial to determine the truth. The court does not delve into the merits of the dispute but examines the complaints, to see if these complaints are genuine or are they baseless and devoid of any substance. If the answer is in the affirmative, resources of the respondent ought not to be wasted defending a baseless or frivolous claim.

[44] The existence of the SPA is not in dispute. In their affidavit in reply to the appellants' application, the respondent has however, denied the existence of the two obligations – see paras. 6 and 23 at pp. 18 and 23 of the record of appeal (2/1).

[45] We have had a look at the SPA, and contrary to the contentions of the respondent, the SPA dated 21 March 2011 does contain terms concerning the sub-division of the bigger plot and the eviction of squatters; for instance recital B and cls. 13(a)(iv) and (b):

Recital B:

The other owners stated in recital A and their respective share in the bigger plot are as follows:

1. Low Far Ke (NRIC No. 600607-10-5941) 2000/47010
2. Low Huat Cheng … …
3. Low Huat Lee …
4. Low Huat Meng …
5. Low Huat Hui …
6. Low Wei Hui …
   (hereinafter collectively referred to as "the other owners")
7. Maika Holdings Berhad 3190/4701

(hereinafter referred to as the Vendor's plot as demarcated in red in the layout plan annexed hereto as Annexure 1). For avoidance of doubt, the other owners have expressly agreed or otherwise have no objections for the Vendor to sub-divide the bigger plot and that the portion shaded in yellow in Annexure 1 ("other owners' plot") shall be ultimately be issued with an individual title with their names endorsed therein as the registered proprietors.

(the smaller plot and the Vendor's plot are hereafter collectively referred to as "the Vendor's properties")

Clause 13. Parties' Representations and Warranties

(a) The Vendor hereby covenants, declares, represents, warrants and undertakes with the Purchaser as follows:

(i) the Vendor is the registered owner of the said Property;

(ii) …

(iii) …

(iv) within four (4) months from the date of this Agreement, evict or remove all and any squatters or unlawful occupiers of the said property.

(b) The Vendor hereby expressly agree and acknowledge that the Purchaser is entering this Agreement and agreeing to purchase the said Property in reliance upon the covenants, declarations, warranties set forth hereinabove including the recitals to the Agreement.

[46] The appellants have also complained that there are still squatters on the land. This is denied by the respondent – see paras. 16 and 19 of the respondent's affidavit in reply at pp. 24 and 25 of the record of appeal (2/1). In addition to the SPA, the appellants have alluded to correspondence exchanged between the parties, post payment and registration, on these matters. In at least one letter dated 5 December 2012 from the respondent's solicitors, the respondent had informed the appellants that "most of the squatters occupying the land then, and that there is now only two families still occupying a small part of the said land" – see p. 150 of the record of appeal (2/1). Photos of the presence of the squatters or occupiers and the temple have also been exhibited – see pp. 212 to 222 of the record of appeal (2/1).

[47] It is not for this court to evaluate to see the truth of these warring contentions and to determine the real position of the squatters or even the matter of location or relocation of a temple on the subject land; that is for the civil court to hear and determine. The same goes for the responsibility to apply for sub-division of the bigger plot; whether the respondent, who retains a portion of the bigger plot, though held on trust, can still make such

an application. For the purposes of s. 263(2), the appellants need to show that their dispute is real, genuine and serious and that they have a *prima facie* case. We have no doubt that in that regard; the appellants have amply satisfied those considerations. The allegation of breaches of agreement by the respondent is not baseless or without substance. They cannot be said to be frivolous and an attempt to waste the respondent's funds or even to score an advantage over the creditors of the respondent.

[48] Finally, we note that the learned judge had expressed the view that the order of specific performance cannot be granted against the respondent because it will cause financial hardship; or be counter-productive to the object of winding up the respondent, which is to preserve the assets of the respondent for fair distribution. Here, once again, we must remind that it is not for the winding up court to decide whether an order of specific performance ought to be granted on the particular facts; that is the function and role of the civil court in the event leave to commence litigation is allowed. The winding up court should not be second-guessing what that court, may or may not eventually decide on the merits. That is entirely within the purview of the civil court.

[49] In this regard, we cannot ignore that the signatories to the SPA who signed on behalf of the respondent are two of the liquidators, although one of them has since passed away. Such persons would be best placed to explain the conflicting versions of obligations.

[50] In this regard too, and, on the concern of hardship, the appellants have shown that there was a retention of some monies amounting to RM993,000, 30% of the purchase consideration by the solicitors of the respondent. This sum is said to have been retained for issues related to private caveat and existing squatters on the subject land. The retention of the sum post SPA is said to confirm the existence of the obligations as alleged by the appellants and address the concerns of the respondent.

Conclusion

[51] For all the reasons stated above, we are of the unanimous view that appellate intervention is appropriate in this appeal. The appeal is allowed with costs of RM5,000 here and below subject to the payment of allocator fee. The decision of the High Court is hereby set aside and leave pursuant to s. 263(2) of the Companies Act 1965 is granted to the appellants to commence action against the respondent.